

1 HOPE CHUNG, et al.,
2
34 Plaintiffs,
5
67 v.
89 INTELLECTSOFT GROUP
10 CORPORATION, et al.,
1112 Defendants.
13Case No. [21-cv-03074-JST](#)**ORDER GRANTING PLAINTIFFS'
MOTION TO DISMISS FIRST
AMENDED COUNTERCLAIM**

Re: ECF No. 162

Before the Court is Plaintiffs and Counterclaim defendants Hope Chung and Picture Mandarin LLC's (collectively "Plaintiffs") motion to dismiss Defendant and Counterclaimant Intellectsoft, LLC's ("Intellectsoft") counterclaim. ECF No. 162 ("Mot"). The Court will grant the motion.

I. BACKGROUND

Plaintiff Hope Chung ("Chung") is the founder and CEO of Plaintiff Picture Mandarin, LLC ("Picture Mandarin"). ECF No. 51 ("SAC") ¶¶ 1–2. Plaintiffs hired Intellectsoft with the goal of developing a website, mobile application, and other software-related work product for Chung that would serve as a part of an educational program intended to teach Mandarin to children. *See* SAC ¶ 12. Specifically, Plaintiffs hired Intellectsoft to work on two projects—the Picture Mandarin Project and the Friendship Diary project—and executed two Statements of Work relating to the two projects (the "SOWs"). *See* SAC ¶ 13; ECF No. 160 at 31. According to the SOWs, "[i]nvoices will be submitted bi-weekly" and "Client will pay Intellectsoft within 15 days of the date of each invoice submitted for all Intellectsoft Services." ECF No. 168-3¹ at 239, 271.

¹ Defendants submitted copies of the SOWs as part of their pending motion for summary judgment (ECF No. 167), which the Court considers on this motion as incorporated by reference into

1 The SOWs further provide that “[p]ast due obligations will bear interest at the rate of 15% per
2 annum, or the maximum rate allowed by law, whichever is less.” *Id.*; *see also* ECF No. 160 at 32.

3 Between 2016 and 2017, Defendants sent Plaintiffs regular invoices for work done
4 pursuant to the Picture Mandarin and Friendship Diary projects. In total, Defendants sent five
5 invoices totaling \$77,269.40 relating to the Picture Mandarin project, and 11 invoices totaling
6 \$246,655.35 relating to the Friendship Diary project. *See* ECF Nos. 51-4; 51-5; SAC at ¶ 74.
7 Plaintiffs ultimately paid these amounts in full. *See* ECF No. 160 at 17 (“Defendants admit that
8 Plaintiffs paid \$323,924.75 to Intellectsoft.”).

9 The parties’ business relationship ultimately broke down, and Plaintiffs sent notices of
10 termination of the SOWs on April 29, 2017. *See* SAC ¶ 67; ECF No. 160 at 12; ECF No. 165 at 6;
11 ECF No. 168-3 at 346. Intellectsoft acknowledged the termination notices on May 2, 2017, and
12 the parties agree that the SOWs were terminated on that date. *See* SAC ¶ 68; ECF No. 165 at 7.

13 Plaintiffs filed this case on April 27, 2021 against Intellectsoft’s parent company,
14 Intellectsoft Group Corporation (“IGC”), and added Intellectsoft as a defendant in its Second
15 Amended Complaint on October 8, 2021. *See* ECF No. 1; SAC. Intellectsoft counterclaimed,
16 alleging that Chung had failed to make timely payments on eight invoices (Invoice Nos. 6064,
17 6074, 6090, 6104, 6119, 6138, 6158, and 6191, collectively, the “Past-Paid Invoices”). ECF No.
18 76 at 31–32.

19 Plaintiffs moved to dismiss Intellectsoft’s counterclaim on the grounds that it was barred
20 by the statute of limitations. ECF No. 80. The Court granted the motion with leave to amend,
21 finding that “the last of Chung’s payments for which there is any support in the record occurred on
22 or about November 2, 2016” and therefore, “the statute expired on November 2, 2020, months
23 before the filing of the counterclaim.” ECF No. 157 at 6. In response, Defendants amended their
24 counterclaim to incorporate by reference Invoice No. 62182 (the “May 2017 Invoice”), dated May
25 5, 2017. ECF No. 160 at 31, 35. Intellectsoft alleges that the May 2017 Invoice was “due on May

27 Intellectsoft’s counterclaim. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (A
28 document may be incorporated by reference where the complaint “refers extensively to the
document or the document forms the basis of the plaintiff’s claim.”).

1 20, 2017 [and] included time worked through at least April 29, 2017 pursuant to work logs that
2 have been produced in this case.” *Id.* at 31. Plaintiffs now move again to dismiss the
3 counterclaim on the grounds that, because the May 2017 Invoice was pre-paid on March 24, 2017,
4 Intellectsoft’s counterclaims are still barred under the relevant statute of limitations. Mot. at 7–10.

5 **II. LEGAL STANDARD**

6 “A Rule 12(b)(6) motion to dismiss a counterclaim for failure to state a claim is evaluated
7 under the same standard as a motion to dismiss a plaintiff’s complaint.” *AirWair Int’l Ltd. v.*
8 *Schultz*, 84 F. Supp. 3d 943, 949 (N.D. Cal. 2015); *see also Oracle Am., Inc. v. CedarCrestone,*
9 *Inc.*, 938 F. Supp. 2d 895, 900 (N.D. Cal. 2013). However, “on a motion to dismiss a
10 counterclaim, the Court cannot accept as true factual allegations alleged by the moving party in the
11 initial Complaint” *State Farm Life Ins. Co. v. Landfried*, No. 5:19-cv-1845-SVW-SHK, 2020
12 WL 5356706, at *3 (C.D. Cal. June 25, 2020) (emphasis omitted). Accepting allegations in the
13 initial complaint as true “would turn the Fed. R. Civ. P. 12(b)(6) standard on its head, permitting
14 [plaintiff] to rely on its own (disputed) factual allegations to dismiss [defendant’s] Counterclaim at
15 the outset of this litigation.” *Id.*

16 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
17 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
18 662, 678 (2009) (quotation marks and citation omitted). Plausibility does not mean probability,
19 but it requires “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*
20 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
21 statements, do not suffice.” *Id.* In determining whether a plaintiff has met this plausibility
22 standard, the Court must “accept all factual allegations in the complaint as true and construe the
23 pleadings in the light most favorable” to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th
24 Cir. 2005).).

25 **III. DISCUSSION**

26 **A. Partial Payment Under Cal. Code Civ. P. § 360**

27 The first question before the Court in this motion is whether Intellectsoft’s amendment to
28 its counterclaim, which incorporates by reference the May 2017 Invoice, cures the deficiencies

1 identified in the Court's prior order dismissing the counterclaim as being barred under California's
2 four year statute of limitations. On its face, the May 2017 Invoice is dated May 5, 2017, and states
3 it was due May 20, 2017 and was paid on March 24, 2017. ECF No. 160 at 35.

4 Intellectsoft argues that the May 2017 Invoice constituted a partial payment or
5 acknowledgement of a continuing contract under California Code of Civil Procedure § 360, such
6 that its counterclaim did not begin accruing until May 5, 2017. Plaintiffs argue that for the
7 purposes of the partial payment doctrine under California Code of Civil Procedure § 360, the
8 Court must look to the date of the actual payment as the date when a claim begins accruing.
9 Because Plaintiffs' last payment was made on March 24, 2017, more than four years prior to the
10 filing of the Complaint, Plaintiffs argue that Intellectsoft's counterclaim is still time-barred.

11 The Court agrees with Plaintiffs. California Code of Civil Procedure § 360 provides that:

12 No acknowledgment or promise is sufficient evidence of a new or
13 continuing contract, . . . unless the same is contained in some writing,
14 signed by the party to be charged thereby, provided that any payment
15 on account of principal or interest due on a promissory note made by
16 the party to be charged shall be deemed a sufficient acknowledgment
17 or promise of a continuing contract to stop, from time to time as any
such payment is made, the running of the time within which an action
may be commenced upon the principal sum or upon any installment
of principal or interest due on such note, and to start the running of a
new period of time, but no such payment of itself shall revive a cause
of action once barred.

18 Cal. Code Civ. P. § 360. As the Court noted in its prior order, Section 360 codifies an equitable
19 exception to the statute of limitations defense that "part payment of a debt or obligation is
20 sufficient to extend the bar of the statute [of limitations]." *Martindell v. Bodrero*, 256 Cal. App.
21 2d 56, 59 (1967). This exception is based upon the theory "that the payment is an
22 acknowledgment of the existence of the indebtedness which raises an implied promise to continue
23 the obligation and to pay the balance." *Id.* Accordingly, Section 360 states the general rule that,
24 in order to be evidence of a "new or continuing contract," an acknowledgment or promise must be
25 "contained in some writing, signed by the party to be charged thereby." Cal. Code Civ. P. § 360.
26 The statute then states an exception to the general rule that "payment on account of principal or
27 interest due on a promissory note made by the party to be charged shall be deemed a sufficient
28 acknowledgment or promise of a continuing contract . . ." *Id.* Therefore, under the express

1 language of Section 360, application of the partial payment exception requires the Court to look to
2 the date of the actual *payment* of principle or interest due, as it is that act of paying that represents
3 an “implied promise to continue the obligation and to pay the balance.” *Martindell*, 256 Cal. App.
4 2d at 59; *see also Minifie v. Rowley*, 187 Cal. 481, 486 (1921) (finding that defendant
5 acknowledged continuing obligation through “conduct” of partial payment, and that statute of
6 limitations would not begin accruing until *date the payment was made*).

7 Intellectsoft’s argument that the Court should disregard the actual date of payment because
8 partial payment is only one way in which an acknowledgement under Section 360 can manifest is
9 unavailing. While Intellectsoft is technically correct that partial payment is not the only way that a
10 party may acknowledge a continuing contractual obligation under Section 360, the statute is
11 unambiguous that any such acknowledgement must be “contained in some writing, signed by the
12 party to be charged thereby.” Cal. Code Civ. P. § 360; *see also Lazar v. Energy Unlimited, Inc.*,
13 No. CV 07-00887 SGL (JCRx), 2009 WL 10673759, at *4 (C.D. Cal. Mar. 30, 2009) (“[F]or an
14 ‘acknowledgment or promise’ to be sufficient to constitute a new or continuing contract that is
15 sufficient to stop the running of the limitations period, that acknowledgment or promise must be in
16 writing, and it must be signed by the party against whom a claim would be asserted.”). Here, and
17 in contrast to its cited authority, Intellectsoft has not alleged the existence of any such writing
18 within the statutory window. *Cf. McNally v. Powers*, No. SACV 22-1569 JVS (ADSx), 2023 WL
19 6373407, at *4 (C.D. Cal. Aug. 2, 2023) (denying summary judgment on statute of limitations
20 defense, based on written emails from the defendant repeatedly acknowledging existence of a
21 debt, which showed “a reasonable inference that [defendant] unconditionally identified and
22 acknowledged the debt owed to [plaintiff].”). Absent such a writing, Intellectsoft cannot plausibly
23 allege that Plaintiffs acknowledged their obligations to pay interest on the Past-Paid Invoices at
24 any point after March 24, 2017. Because the Complaint was filed over four years after March 24,
25 2017, Intellectsoft has failed to plead any facts sufficient to establish that the statute of limitations
26 should be extended under California Code of Civil Procedure § 360.

27 **B. Delayed Commencement Rule v. Continuous Accrual Doctrine**

28 Separately, Intellectsoft argues that its counterclaim is not time-barred because its

1 counterclaim only accrued upon termination of the SOWs on May 2, 2017, under the “rule of
2 delayed commencement” which permits plaintiffs, “in cases where a continuing duty has been
3 breached,” to file suit “when the time for complete performance has passed.” *Israelsky v. Title*
4 *Ins. Co.*, 212 Cal. App. 3d 611, 617–18 (1989). Plaintiffs counter that the Court should apply the
5 “doctrine of continuous accrual,” whereby “each breach of a recurring obligation is independently
6 actionable,’ with each triggering a new limitations period.” ECF No. 166 (“Reply”) at 9 (quoting
7 *Gilkysen v. Disney Enterprises, Inc.*, 244 Cal. App. 4th 1336, 1341 (2016)).

8 This issue was presented squarely before the California Court of Appeals in *Eloquence*
9 *Corp. v. Home Consignment Ctr.*, 49 Cal. App. 5th 655 (2020). In *Eloquence*, the court
10 considered whether to apply the delayed commencement rule or the doctrine of continuous accrual
11 to a consignment agreement between the parties, in which the defendant would send monthly sales
12 reports to plaintiff and plaintiff would in turn prepare invoices setting forth payments due from
13 defendant. In applying the continuous accrual doctrine, the *Eloquence* court considered whether
14 the agreement “contemplate[d] divisible, interval performance by [defendant]” by looking at the
15 express terms of the agreement, “as well as extrinsic evidence of such objective matters as the
16 surrounding circumstances under which the parties negotiated or entered into the contract; the
17 object, nature and subject matter of the contract; and the subsequent conduct of the parties.” *Id.* at
18 661. The *Eloquence* court concluded that the agreement was divisible, because the express terms
19 of the agreement required defendant to pay discrete invoices within a certain deadline, the subject
20 matter of the agreement required plaintiff to issue discrete invoices dependent on sales or
21 inventory of a particular month, and the parties’ subsequent conduct showed no evidence that
22 unpaid amounts on one invoice were ever carried onto any subsequent invoice. *Id.* at 662.

23 *Eloquence* is instructive here. As in that case, the SOWs here provided that Intellectsoft
24 would issue discreet invoices dependent upon hours worked, that Plaintiffs were required to pay
25 these discrete invoices within a certain period (15 days), and that Intellectsoft never carried unpaid
26 interest on the Past-Paid Invoices onto subsequent invoices. Similarly, as in *Eloquence*,
27 Intellectsoft’s counterclaim “is not based on some continuing obligation; rather it arises out of
28 [Plaintiffs] failure to perform its discrete and specific obligations” to pay the Past-Paid Invoices in

1 time. *Id.* at 663. Therefore, the Court finds that the SOWs, like the agreement in *Eloquence*,
2 “establish divisible, interval performance by [Plaintiffs] of [their] payment obligations” such that
3 the doctrine of continuous accrual applies. *Id.* at 662.

4 *Dreyer’s Grand Ice Cream, Inc. v. Ice Cream Distributors of Evansville, LLC*, No. 10-
5 00317 CW, 2010 WL 1957423, at *2 (N.D. Cal. May 14, 2010), cited by Intellectsoft, is
6 distinguishable. The invoices in *Dreyer’s* were issued pursuant to an overarching credit agreement
7 between the parties, wherein the defendant agreed to pay “all amounts due” and the plaintiff chose
8 to extend credit to the defendants until the final invoice became due. *Dreyer’s*, 2010 WL
9 1957423, at *1–3. Because no such facts are present in this case, and the SOWs lend themselves
10 “more readily to divisible payment obligations than the credit agreement in *Dreyer’s*” the Court
11 declines to apply the rule of delayed commencement to Intellectsoft’s counterclaim. *Eloquence*,
12 49 Cal. App. 5th at 664 (distinguishing *Dreyer’s*).

13 Because the Court finds that the doctrine of continuous accrual applies to the SOWs, it
14 rejects Intellectsoft’s argument that its counterclaim is not time barred because it only began to
15 accrue upon termination of the SOWs on May 2, 2017.

16 **C. Leave to Amend**

17 Plaintiffs request that the Court dismiss Intellectsoft’s counterclaim with prejudice. The
18 decision of whether to grant leave to amend is within the discretion of the district court, which
19 may deny leave to amend “due to ‘undue delay, bad faith or dilatory motive on the part of the
20 movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice
21 to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.’”
22 *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008) (quoting *Foman v. Davis*,
23 371 U.S. 178, 182, (1962)).

24 The Court will deny leave to amend. Intellectsoft has previously been given leave to
25 amend its counterclaims. “Where the plaintiff has previously been granted leave to amend and has
26 subsequently failed to add the requisite particularity to its claims, the district court’s discretion to
27 deny leave to amend is particularly broad.” *Nguyen v. Endologix, Inc.*, 962 F.3d 405, 420 (9th Cir.
28 2020) (internal citation and quotation omitted). Moreover, fact and expert discovery are now

1 closed, and it is unlikely that Intellectsoft would be able to identify any new facts that would
2 correct this deficiency in its counterclaim. Finally, granting Intellectsoft further leave to amend at
3 this stage of the litigation would cause undue delay and prejudice to Plaintiffs. Expert discovery
4 has been closed in this case since October 6, 2023, the parties have fully briefed Defendants'
5 motion for summary judgment, and this case is scheduled for trial on March 11, 2024.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court grants Plaintiffs' motion to dismiss Intellectsoft's
8 amended counterclaims with prejudice.

9 **IT IS SO ORDERED.**

10 Dated: January 29, 2024



11 JON S. TIGAR
12 United States District Judge